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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term, 1930.

Number 63.

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ABIE STATE BANK, ET AL., APPELLANTS,

V.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; T. W. BASS, AS TREASURER, ETC., ET AL.

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APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA.

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## PETITION OF APPELLANTS FOR REHEARING.

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FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
*Attorneys for Appellants.*

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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Attorneys for Appellants.

COME NOW the above named appellants, the Abie State Bank, et al., and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

The decision and conclusion of this Court is based upon, and controlled by, the recent Nebraska statute, effective on March 18, 1930, modifying the Bank Guaranty Law and providing for a "depositors' final settlement fund." That statute was enacted and became a law almost three months after the final decision in this case by the Supreme Court of the State of Nebraska in December, 1929. The appellants did not anticipate that the conclusion of this Court would be based upon the operation of the new law, which preserved and kept in force the assessments complained of, nor that the new law would be held to change the effect of those assessments, and for that reason did not in their original briefs bring to the attention of the Court, nor raise, questions that they would and should have raised had they anticipated such a ruling, and this brief is for the purpose of calling to the attention of the Court and urging a consideration of two propositions supplemental to the questions raised, briefed and argued in the original briefs filed herein.

These propositions are:

I.

The act of March 18, 1930, providing for assessments on the future operating banks to pay depositors in those banks which had failed prior to the enactment of the law, is unconstitutional on its face, in that it takes assessments from one class of banks to pay depositors in another, and deprives the future operating banks of their property without due process of law, and denies

them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

The assessments provided by the act of March 18, 1930 are excessive, burdensome and confiscatory as a matter of fact, and these facts, developing since the commencement of our suit in 1928, we have not so far had opportunity to bring to the attention of the Court, and should be permitted, by a further trial in this case, before the assessments under the new law are finally sustained, to be given a hearing and an opportunity to make a showing in that regard.

**BRIEF AND ARGUMENT.**

We do not complain of the decision of the Court as to the propositions which were briefed and argued to the Court by the parties in the case. This application is made not for the purpose of gaining a rehearing upon anything decided by the Court on the record in this case but for the purpose of having additional propositions passed upon which were not raised nor asserted by either of the parties prior to the decision of this case by this Court.

The appellees, the State and the Attorney General, did contend that the new law, by the repeal of the old, had rendered our case moot. We took the position that, since the new law preserved the assessments of which we were complaining and continued them in effect, we were not barred from asking relief against them in this case. This Court has held with us in that contention, and held that in this case we could try out the question of the legality of the assessments even as re-

enacted under the new law. We also pointed out to the Court in argument that there were no facts in the record with reference to the new law since the date of the commencement of our case in December, 1928.

We had assumed that if these assessments were illegal and confiscatory when levied, that they continued to be so even after the new enactment, but the Court has held, that, as additional time to pay them is provided, and further future assessments are decreased in amount, it is "unable to say," at least on the present record, that under the new provisions the assessments are confiscatory. This definitely brings the new law and the question of its operation into our case.

That the new law and its operation, in view of conditions during the year since its enactment, will now be controlling of the decision in this case has challenged our attention for the first time. With the new law involved, the two questions which we present have not heretofore been raised, and could not have been raised in the courts below, and we urge that these questions are not only proper but necessary to a determination of whether we are entitled to the relief asked. These questions we could not have raised in the Nebraska courts, for those decisions were prior to the enactment of the new law, and we feel that we are now making a timely and proper presentation of them.

These propositions we do urge now and ask the Court for a determination of them.

**Proposition I.**

In our original brief we made the contention that, the Depositors Guaranty Fund being hopeless insolvent, the old law in its operation no longer bore a rational

relation to any public purpose, as the collection of future assessments, the ones in question, *regardless of amount,* took away from the security of present depositors in going banks in order to pay alone the depositors in banks that had long since failed, and that the payment of assessments was without hope or tendency of furnishing protection to present depositors. We insisted that instead of the challenged assessments creating a fund for the safeguarding of depositors in going banks, as was the original purpose, they directly defeated that object, and that since the law did not operate at the time we brought our suit for any public purpose, that any taking *in any amount* was a taking without due process of law and confiscatory. This particular attack, however, was upon the operation of the *old* law and this Court has not passed upon that question. We did not raise the specific question with reference to the *new* law, and therefore presented no question as to the new law in that regard for this Court to pass upon.

As we view the new law it emphasizes, magnifies, and makes definitely certain the very kind of defect which we urged against the old.

It provides that from March 18, 1930, the future operating banks shall pay assessments, not to go into a fund by which their own depositors will be protected, but that these moneys shall be taken from the protection of their own depositors, and for the benefit of another class of depositors. These assessments in no way bear any relation to the protection of the going banks. The effect of these assessments is to take from the going banks and to pay to the depositors in banks which failed prior to March 18, 1930, and without any hope or tendency of furnishing protection to present depositors, and in fact directly defeating, in current operation, the object of the

original Bank Guaranty Law. The going banks, by such assessments, are weakened rather than strengthened. The banks paying the assessments receive no reciprocal advantage, for no fund is created or employed for the protection of their own depositors. Such advantages, as are absent here, were pointed out in the original opinion of this Court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, as the justifying grounds of the original law.

The new law in its effect now taxes the going banks to pay the debts of an entirely different class of banks, banks which had failed prior to March 18, 1930. Not only does the law require all future assessments to be paid to this class of banks which failed prior to March 18, 1930, but it also gives *priority* to claimants whose claims had been *allowed and certified for at least one year prior thereto*. Owing to the enormous amount of such claims, these latter mentioned claimants may receive the bulk, if not all, of the future assessments.

On March 18, 1930, the adjudicated claims against the Guaranty Fund had increased to $28,088,706.00, and in addition to this there were $726,094.00 claims against the fund which were in dispute.

By the new law the depositors in these failed banks not only receive the full assessments for their protection up to the time of the enactment of the law on March 18, 1930, both regular and special, but the future operating banks must now add to those payments regular assessments of two-tenths of one per cent per year for the period of ten years; all of these assessments under the new law in no way tending to stabilize or safeguard banking and banking practices in Nebraska, but having the direct opposite effect, in that they impose a direct and additional burden upon these banks without reciprocal

benefits of any kind, and require the transfer of their funds to the depositors of an entirely different class of banks, towards whom there is no reciprocity of benefit, action or conduct.

At the time of the commencement of our suit in December, 1928, the deficit in the Guaranty Fund was around $16,000,000.00, but on March 18, 1930 this deficit had increased so that after deducting the value of the assets, as appraised by their field workers, the actual existing deficit on that date was around $23,000,000.00.

We submit that, if this were an original guaranty law, providing for assessments against the going banks in favor of the depositors in banks which had already failed prior to the enactment of the law, unquestionably the law would be unconstitutional, as an illegal deprivation of the properties of these banks for no public purpose; and we are unable to see how this law, even in the light of a prior existing Guaranty Law, stands upon any different basis, for in its effect and operation it is identically the same as if it were an original initial enactment.

By the opinion of this Court it is held that there was no contractual obligation existing against the banks for the payment of any of these assessments. What obligation there was, if any, was entirely statutory, continuing only so long as the law remained in its operation constitutional.

Illustrative of the effect of the operation of the new law, we wish to call the Court's attention specifically to the following facts:

Since the enactment of this law, in March, 1930, thirty-two state banks have been closed. A list of them follows:

| *City* | *Name of Bank* |
|---|---|
| Newport | Farmers State Bank |
| Wahoo | Nebraska State Savings Bank |
| Touhy | State Bank of Touhy |
| Weston | Farmers & Merchants Bank |
| Colon | State Bank of Colon |
| Valparaiso | Oak Creek Valley Bank |
| Wahoo | Citizens State Bank |
| Omaha | Bank of Florence |
| Arnold | State Bank |
| Arnold | Security State Bank |
| Monowi | Ponca Valley State Bank |
| Denton | State Bank |
| Norfolk | Nebraska State Bank |
| Plymouth | Farmers State Bank |
| Alexandria | State Bank of Alexandria |
| Fort Calhoun | Washington County Bank |
| Creighton | Bank of Creighton |
| Verdigre | Knox County Bank |
| Pierce | Citizens State Bank |
| Battle Creek | Valley Bank |
| Center | State Bank |
| Orleans | Bank of Orleans |
| Stuart | Citizens Bank of Stuart |
| Guide Rock | State Bank |
| West Point | Nebraska State Bank |
| Niobrara | State Bank of Niobrara |
| Platte Center | Farmers State Bank |
| Madison | State Bank of Madison |
| Tecumseh | State Bank |
| Nelson | Farmers State Bank |
| Columbus | Home Savings Bank |
| Columbus | Columbus State Bank |

*Twenty-three of these banks are banks whose names appear on our petition as plaintiffs in this suit.* These

banks have operated since the new enactment of March, 1930, and have, by the provisions of the new law, become liable for the assessments provided by the new law. All of the three special assessments and the two general assessments provided by the old law are now by the new law imposed upon all of these above named banks. These assessments deplete the assets of these 32 banks; take from those banks and from their depositors these assets and pay them to banks which had failed prior to the enactment of the law. The operation of the law takes from one class of banks and from one class of depositors and pays to another, depending upon the fact of whether the bank failed prior to March 18, 1930 or after. The depositors in these 32 banks lose to the extent of these assessments. The depositors in the banks failing prior to March, 1930, gain to the extent of these assessments. The law takes from one and gives to another. It is discriminatory. It denies the equal protection of the law, and what has occurred during the year of operation under this law is only an example of what will occur during the future ten-year period of its operation. All assessments collected will never go for the protection of the operating banks nor for their depositors, and all of the state banks that fail during the next ten-year period will contribute, to the prejudice of their own depositors, for the benefit of depositors in banks that failed prior to the enactment of the law.

Had the contention of the interveners been sustained, to the effect that the banks had, by operation under the old law and the acceptance of it, impliedly contracted with all of the depositors in other banks that they would pay their claims, and hence had these banks become liable for the payment of the $28,000,000.00 in claims against the banks which had failed prior to the enactment

of the law, then we could see justification for continuing that liability in effect; but, as we contended and as this Court has *now held*, there was no such contractual or implied obligation, and when the law in its operation becomes unconstitutional, liability for future assessments ceases. When the operation of the law fails to sustain a rational relation to a public purpose, then it must from that moment fail, and the *new* law, even by its *avowed purpose*, does not sustain such a relation to any public purpose.

As pointed out by the Court in its opinion the new law, as by its own terms it declares, was enacted:

> "for the purpose of providing a fund for depositors in state banks closed prior to the time of the new enactment."

The contractual obligation of the banks to their depositors was, as pointed out by the Court in its opinion, an indebtedness existing alone between the individual depositor and the individual bank, and the going banks owe no contractual obligation to the depositors of other banks than their own. The obligation is a private debt owing by the bank to its depositor. The payment of that debt by future assessments against the going banks serves no public purpose. It does not tend to stabilize banking. There is no reciprocity of advantage to the going banks making such payments.

Although the old law created an intolerable burden upon these banks, the new law proposes, by a retroactive effect, to add to the amount that has already been paid during the current operation of the law, which manifestly ceased as a Guaranty Law on March 18, 1930. In addition to the huge assessments provided under the old law, the future going banks must now pay an amount

yearly during the period of ten years, to supplement and add to what they have theretofore paid, for the benefit of the banks which failed prior to March 18, 1930. The new law is based upon that principle, and as to that principle we submit the law must fall as unconstitutional, and that every assessment provided under or preserved under it is tainted with the same fault.

The Supreme Court of Nebraska has held, in *Weaver v. Kochn*, 231 N. W. 703 (Neb.), that, under a law passed since our case was commenced, a general tax levied against the people of the state to pay the depositors in banks that had theretofore failed could not be justified, since it was not a taking for any public purpose but accomplished merely the payment of private debts, and that such a law constituted the taking of money belonging to one class to pay the claims of those of another class. The Supreme Court of Nebraska in that opinion said:

> "But the appropriation of money by the state, to reimburse depositors for losses sustained by them, in failed banks, clearly appears to be the taking of money belonging to one class to pay the claims of those of another class. And this is in violation of the due process provision of the Federal and State Constitutions. • • •
>
> "In view of the facts as presented, it clearly appears to us that the losses of individual depositors in state banks cannot lawfully be made up nor paid from the appropriation of money that belongs to all of the people of the state. The deposits herein were merely business transactions between the bank and the depositor, and the public should not be made to pay for the losses that a depositor may have suffered in such transactions."

We think the reasoning and conclusion of the court in that case is directly applicable to the enactment of March 18, 1930.

We submit that the operation of the new law, to create a depositors' final settlement fund, and providing for payment of debts of the banks that failed before the law was enacted, as to the banks appealing in this case, is not in any particular different from the operation of the law, imposing a tax on the people for that purpose, under the statute above named and involved in *Weaver Kochn*, so held to be unconstitutional and to be in violation of the due process clause of the Federal and State Constitutions.

In the operation of this new law, providing for the payment of the debts of the failed banks, there is now no public purpose served. Its purpose is not to make the going banks safe and keep them from failing, but to pay the past accumulated private debts of other banks that have theretofore failed. The same rule to determine whether a public purpose exists would apply as to each of the statutes mentioned. If the payment of the depositors in the banks that failed while operated by the state had borne a rational relation to the stabilization of present banking, to the protection of present depositors, to the prevention of panics and runs on banks, then the law imposing a tax upon the general public would have served a public purpose and would necessarily have been sustained; it would then have been sustained especially in view of the fact that the legislature may meet the moral obligations of the state. But the payment of these depositors in banks theretofore failed served no public purpose now and that law was declared unconstitutional. The Supreme Court of Nebraska in that case said that this clearly:

> "appears to be the taking of money belonging to one class to pay the claims of those of another class."

Just so does the Guaranty Law now take the money of the banks, and take away from the present depositors of those banks their protection, in order to pay the depositors in banks that have failed prior to March 18, 1930. It takes from one class and pays to another. It deprives one class of individuals of protection and benefits another class of individuals, and no public purpose is served thereby.

Since our case was commenced the legislature has, by three distinct methods, made an attempt to raise funds to pay the claims of depositors in banks that had theretofore failed.

One method was by a legislative enactment, requiring payment of part of these claims by general taxes. This is the enactment that the Supreme Court of Nebraska held unconstitutional in *Weaver* v. *Koehn*.

The second method was by the submission of a constitutional amendment to the people to permit the state to borrow $8,000,000.00 for that purpose. This was overwhelmingly defeated at an election in November, 1930.

Both the Supreme Court of Nebraska and the people, by general vote, have recognized the injustice of collecting money from others to pay the past debts of the failed banks.

The enactment of March 18, 1930, of which we are now complaining, is the only method, provided by the legislature, which is now left, through which a part of these moneys was to be provided, and it is unjust, unreasonable and inequitable for exactly the same reasons that the other methods provided by the legislature were found to be, for by this enactment the money is taken from some to pay the private debts of others.

We realize that this Court would not pass upon any constitutional question with reference to any law except that such question is specifically raised, presented and urged, and that we could not expect a decision on this question we are raising now without that question being presented, nor expect this Court on its own motion to hold the new law unconstitutional without that law being attacked on that ground. The opinion of the Court as it stands upholds the new law and without its constitutionality having been challenged by us. This question is one which we feel compelled to, and do now urge, and we respectfully pray the Court's consideration and determination of the question as applied to the new enactment.

**Proposition II.**

The Court in its opinion says that it is:

> "unable to say that the statute in this modified form is confiscatory, or other than a reasonable method of liquidating the guaranty plan."

We interpret this statement as being based upon the present condition of the record. The statement is not an affirmative declaration that the law is not confiscatory, but is a declaration that the Court, in view of the record and the questions raised, cannot, at this time, so declare, *although the validity of such assessments is considered before it for determination.*

Our suit was commenced in December of 1928. Necessarily our showing of fact continued up to that date and no further. There is not in this record any showing of fact since December, 1928, and we respectfully urge that we be given the opportunity in this case of making such a showing now, and that if the new law is not to

be declared unconstitutional upon the first proposition above urged, that the mandate or opinion at least direct that we be given opportunity in the state courts to make a showing of fact as to whether the assessments under the new law are actually in amount excessive, unreasonable, burdensome and confiscatory.

When our case was begun in 1928 there were 726 banks operating in Nebraska. There are now 574, a decrease of 152.

Some months prior to the commencement of our suit, when it was first learned that the Guaranty Fund was hopelessly insolvent, to the extent of some $16,000,000.00, there were deposits in all of the state banks of some $252,000,000.00. When it was learned that the Fund was not only insolvent but that there was this huge deficit in the Fund, and when it was learned that in the place of there being an actual Guaranty Fund to furnish protection that the depositors in failed banks were claiming that the going banks, on a contractual liability should be held, in addition to what they had paid, to the full payment of the $26,000,000.00 of claims then existing, depositors in going banks lost faith in protection from the law and withdrew deposits.

In July of 1928, several months prior to the commencement of our suit, the hopeless condition of insolvency of the Guaranty Fund was first published in the papers, from a speech disclosing such conditions made by the state's attorney, acting for the Guaranty Fund Commission.

Prior to the trial of our case the Governor of the State of Nebraska, on January 6, 1929, in his inaugural address to the legislature, which address was broadcasted

by radio over the state, described the hopeless insolvency of the Guaranty Fund and pointed out that present depositors were no longer protected. He said:

> "I respectfully call your attention to the fact that the Guarantee Fund, as nearly as I can ascertain, has present and prospective liabilities above present assets of from sixteen to twenty million dollars, that the present income from assessments on banks is approximately one and one-half million dollars; that most of these liabilities either are, or soon will be, reduced to judgment, and the judgments will draw interest at seven per cent, which on a basis of twenty million dollars makes an annual interest charge of one million four hundred thousand dollars; that with any appreciable reduction in this income either from further bank failures, nationalization of some of the present state banks, or seasonable declines in deposits, the income will meet the interest charge only, and no funds will be available to pay the principal; that under such a situation the Guarantee Fund cannot afford protection for present depositors against any such future losses. • • •
>
> • • • The state banks of Nebraska have already paid, in their efforts for the protection of their depositors, an amount almost equal to the capital of all state banks, and that a continuation of such a load threatens the whole system."

With these facts made public as to the hopeless condition of the Guaranty Fund and with the asserted claim of huge liability against the banks of $20,000,000.00 made by the interveners in this case, depositors in banks lost faith in any protection from that Fund and there was a consequent and large withdrawal of deposits from state banks, so that the deposits now in the 574 remaining banks have been reduced to $130,000,000.00, there being approximately $113,000,000.00 decrease in deposits

since the insolvent condition of the Fund was first made known in July of 1928.

During the last two years Nebraska has not been exempt from the general business depression, and we submit that before the enactment of March 18, 1930 is passed upon as to the assessments complained of we should be given opportunity to show whether, in view of the present conditions existent during the year in which that law has been effective, the assessments provided thereunder are in *fact* excessive, burdensome, unreasonable and confiscatory.

These facts this Court does not have before it, nor were we able to present such facts to this court, since our case was concluded in the state courts long prior to the enactment of the new law, and we respectfully submit that we should be given opportunity of making a showing of fact and a trial of those issues of fact in this case for the purpose of final determination as to whether the new law is confiscatory in fact.

**This Decision Will be Cited as Res Adjudicata as to the Assessments Complained of**

The decision of this Court will be cited as res judicata *upon that question and upon all questions pertaining to the validity of the assessments complained of* and without our having had opportunity to make a showing of fact in that regard. In fact that we being publicly asserted by the state now.

This Court in its opinion declares that in this case the Court *has power to grant appropriate relief*; that the assessments complained *of are before it here* for adjudication, and in view of that declaration it is positively incumbent upon us to raise the additional questions presented in this brief and ask for their determination.

In this case *only* can appropriate relief be given. The questions we are raising are proper to be raised here, and since they are proper we must raise them and have them passed upon, or this decision may be held a bar to raising them at any other time. The decision may be a bar not only to questions which are actually raised but those which should properly be raised.

Let us forcibly call to the Court's attention the position in which the banks will be left if relief is not given. The Court has before it the assessments under the old law. The new law provides that *if it is held unconstitutional the old law shall remain in effect*, and this Court alone, if the new law is held unconstitutional, is able to grant relief as against the old assessments. In another suit this decision would be urged as a bar against us, in such event, from bringing another suit against the assessments under the old law.

## CONCLUSION

We respectfully submit, first, that the new law is on its face unconstitutional, in that it takes property without due process of law and denies the operating banks the equal protection of the law, and this regardless of the amount of the tax.

And, second, we respectfully submit that the determination of whether or not the assessments provided by the new law are excessive and confiscatory, even if the new law is held to be for a public purpose, is a question of fact, depending upon the effect of such assessments upon the banks, and that we should be accorded opportunity to make such showing, and we submit that the opinion and the mandate of this Court should protect us on the questions now urged.

We respectfully pray that this Court grant us a hearing upon these two propositions.

Respectfully submitted,

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
*Attorneys for Appellants.*

**CERTIFICATE OF COUNSEL.**

I, Leonard A. Flansburg, counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

*Counsel for Appellants.*

Leonard A. Flansburg